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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1967

No. 1343

THELBERT EARL O'KELLEY and
EUGENE THURMAN LANDERS, JR.,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the Court of Appeal of the State of California
First Appellate District, Division Two
1 Criminal 6003

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Come now—Petitioners above named, Thelbert Earl O'Kelley and Eugene Thurman Landers, Jr., acting through their counsel, and respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, in and for

the First Appellate District under date of November 27, 1967, affirming the judgments of conviction rendered in the Superior Court of the State of California, in and for the County of Solano, under date of September 2, 1966, as heretofore finalized by Order of the Supreme Court of the State of California on January 24, 1968, when a hearing was denied thereon.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, was not officially reported. The opinion is set forth in Appendix A to this Petition. No opinion was rendered by the Supreme Court of the State of California; its order denying a hearing on the Decision of the Court of Appeal is set forth in Appendix B. The oral proceedings had before the trial Court on Petitioners' motions for deposition of out-of-state material witness and for issuance of subpoena for out-of-state material witness is set forth in Appendix C.

JURISDICTION

The judgment of the Court of Appeal of the State of California, in and for the First Appellate District under date of November 27, 1967, was finalized by Order of the Supreme Court of the State of California on January 24, 1968, when a hearing was denied thereon. (Appendix B *infra.)* The jurisdiction of this Court is invoked under 28 U.S. Code 1257(3).

QUESTIONS PRESENTED

1. Whether the Petitioners were denied due process of law by the trial Court not granting their application and motion for certificate for issuance of subpoena for out-of-state material witness who was essential and material to the trial and defense of their case.

2. Whether the procedures resorted to in the Petitioners' case, which not only encouraged and facilitated the informer to leave the State of California, but repelled him from the State of California, denied Petitioners a fair trial and deprived them of due process of law.

STATUTES INVOLVED

The following statutory provisions are set forth in Appendix D, *infra.*

Constitutions:

California Constitution, Article I, Section 13;
California Constitution, Article 6, Section 4½;
United States Constitution, Sixth Amendment;
United States Constitution, Fourteenth Amendment.

Codes and Statutes:

California Health and Safety Code, Section 11530.5;
California Health and Safety Code, Section 11531;

California Penal Code, Section 686;
California Penal Code, Sections 1334.3, 1334.4, 1334.5;
Wisconsin Statutes Annotated, Section 885.33.

Federal Statutes:
28 U.S. Code 1257(3).

STATEMENT

In the early morning hours of December 31, 1965, Petitioners were arrested and subsequently formally charged with violation of Section 11530.5 of the Health and Safety Code of the State of California, to-wit: Possession for sale of marijuana; and violation of Section 11531 of the Health and Safety Code of the State of California, to-wit: Transportation of marijuana. Michael John O'Connell, an alleged informant, was the primary cause for the investigation and subsequent arrest of Petitioners herein.

Sometime prior to the aforesaid night, and around the fourteenth (14th) day of September, 1965, the alleged informant, O'Connell, was likewise arrested on two charges of violating the narcotics laws of the State of California, to-wit: Possession, transportation and sale of marijuana. (R.T. 18, 31, 32, 134, 5[illegible].) While still in jail, O'Connell, through Sergeant Lynch, talked to Sergeant Allbritton, both of the Vallejo Police Department, with regard to making a "deal." (R.T. 33, 184, 185, 186.) A "deal" and agreement was made wherein the pending criminal charges against O'Con-

nell would be dismissed in return for his cooperation and information leading to the arrest of Petitioners. (R.T. 185, 186.) On December 30, 1965, O'Connell was still charged with the aforementioned narcotics violation and was out on bail pending trial. (R.T. 63, 64.) Immediately following the arrest of Petitioners on December 30, 1965, O'Connell was released from custody and the pending criminal charges, which could legally and justifiably have been prosecuted against O'Connell were dismissed pursuant to the "deal" with the police department and the district attorney's office of Solano County. (R.T. 64-66, 68, 454, 496-497.) Thereupon Sergeant Allbritton advised O'Connell that he was at liberty to leave the State of California. (R.T. 31, 61, 62, 102, 103, 496.)

O'Connell did in fact leave the State of California, and subsequently returned in March, 1966. On March 15, 1966, O'Connell gave an oral statement to Charles M. Gianola, counsel for Petitioners herein, which statement was favorable to the defense of Petitioners' case. (C.T. 13-20.) On said date, Charles M. Gianola took immediate steps to make arrangements to surrender O'Connell to the office of the district attorney and to have a deposition taken at that time. However, upon arrival at the building, wherein the office of the district attorney is located, O'Connell fled, and the police were unsuccessful in their efforts to have him arrested. (R.T. 102, 112, 113, 501.)

Subsequent thereto, after notice of the informant's favorable statement to the petitioners, the district attorney saw his way to retaliate against O'Connell

for breaching his "deal" with the police in communicating with and giving information favorable to the defense, by recharging and reinstating the original criminal charge against him.

O'Connell was then arrested in the State of Wisconsin and extradition proceedings commenced.

On June 27, 1966, counsel for Petitioners, being greatly concerned that they have the personal appearance of O'Connell at the time of trial, made application for order for examination of material witness on commission, and application for certificate for issuance of subpoena for out-of-state material witness. (C.T. 30-35.)

After hearing arguments by respective counsel on these motions, the trial Court ordered that the motion for order for examination of material witness on commission be granted. (C.T. 36) (R.T.P. 2-14.) The trial Court further ordered that the Petitioners' motion for certificate for issuance of subpoena for out-of-state material witness be denied even on the condition that extradition be defeated. (C.T. 38; R.T.P. 14.)

The trial Court then vacated the original trial date of July 6, 1966, and reset the date of trial for August 16, 1966. (C.T. 38) (R.T.P. 15-16.)

Exactly as anticipated by Petitioners extradition was defeated by the informant in the State of Wisconsin on August 15, 1966, and Petitioners were forced to proceed with trial on August 16, 1966. (C.T. 55.) The trial continued through August 18, 1966, at which time the trial Court found Petitioners guilty of both

Counts I and II as charged in the information on file herein. (C.T. 63.)

On September 2, 1966, Petitioners were committed to the state prison for the term prescribed by law. (R.T.M. 56.) Execution of judgment of conviction was suspended and bail allowed pending appeal as to each Petitioner. (C.T. 106-109); (R.T.M. 62-63.)

Petitioners appealed the trial Court's decision to the Court of Appeal of the State of California, in and for the First Appellate District on the following grounds (in pertinent part) "1. The trial Court prejudically erred in not granting appellants' application and motion for certificate for issuance of subpoena for out-of-state material witness who was essential and material to the trial and defense of their case. . . . 3. The procedures resorted to in the instant case, which not only encouraged and facilitated the informer to leave the State of California, but repelled him from the State of California, manifestly denied appellants a fair trial and deprived them of due process of law . . ." The Court of Appeal filed its Decision, adverse to Petitioners, November 27, 1967. A copy of the Decision of the Court of Appeal is set forth in Appendix A, *infra.*

Petitioners' petition for hearing to the Supreme Court of the State of California was denied on January 24, 1968. A copy of such order is set forth in Appendix B, *infra.*

RAISING OF THE FEDERAL QUESTION

The Federal questions here presented were specifically raised on June 27, 1966, when counsel for Petitioners duly filed and made application for order for examination of material witness on commission and application for certificate for issuance of subpoena for out-of-state material witness. (C.T. 30-35.)

After hearing arguments by respective counsel on these motions, the trial Court ordered that the motion for order for examination of material witness on commission be granted. (C.T. 36); (R.T.P. 2-14.) The trial Court further ordered that the Petitioners' motion for certificate for issuance of subpoena for out-of-state material witness be denied even on condition that extradition be defeated. (C.T. 38); (R.T.P. 14.)

The trial Court then vacated the original trial date of July 6, 1966, and reset the date of trial for August 16, 1966. (C.T. 38); (R.T.P. 15-16.)

On the eve of the commencement of trial it was learned that O'Connell could not be extradited, thus forcing Petitioners to trial without said material witness.

On September 2, 1966, the Petitioners filed with the trial Court written notice of intention to move for a new trial. Petitioners contended that the trial court denied Petitioners of their constitutional right for the State to compel process for attendance of material witness at the time of trial. (R.T.M. 5.) The Motion was denied.

Petitioners appealed to the Court of Appeal of the State of California in and for the First Appellate District on the above ground, in addition to the flagrant denial of due process in the procedures resorted to by the People in repelling the material witness from the State of California. The appeal was denied November 27, 1967. A hearing by the Supreme Court of the State of California on the same grounds was denied on January 24, 1968.

REASONS FOR GRANTING THE WRIT

1. The Court below has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court. In holding that there was no error in denying Petitioners' repeated request that a subpoena issue for out-of-state material witness who was essential and material to the trial and defense of their case, the Petitioners were denied their Sixth Amendment right to compulsory process for obtaining a material witness in their favor.

The testimony and personal appearance of Michael John O'Connell was absolutely essential and material to the trial and defense of Petitioners' case herein. He was the only witness who was in a position to amplify or contradict the prosecution's witnesses, particularly with regard to the detailed facts relative to making a determination as to his reliability as an informer and, as such, he was a material witness for the Petitioners. Further, he was a material witness

with regard to amplifying or contradicting the prosecution's witnesses as to the detailed facts relative to making a determination as to the charge of possession for sale.

The Petitioners have the Constitutional and statutory right to confront and cross-examine witnesses and to obtain *compulsory* process for their production that have been guaranteed by Article I, Section 13, California Constitution, and the Sixth Amendment to the Federal Constitution, which has been held to be applicable to the states by virtue of the Fourteenth Amendment. (See *Pointer v. Texas,* 380 U.S. 400; 85 S. Ct. 1065, 13 L. Ed. 2d 923; see also *California Penal Code* Section 686.) Further, Section 1334.3 of the California Penal Code gave the trial Court power to issue a certificate that a person in another state is required as a material witness and have that certificate presented to a Court of the state in which such person is found if said state has provisions for commanding such person to testify in this state and, in this connection, Wisconsin has such provisions in its statutes. *(Wisc. S.A.* 885.33.)

The Petitioners' application and motion for certificate for issuance of subpoena for out-of-state material witness was properly and timely made. The trial Court in denying said application and motion without stating any reason whatsoever for such denial arbitrarily abused its discretion to the prejudice of Petitioners. In this regard, the argument of the District Attorney was completely fallacious and contradictory. In one breath he argued to the trial Court that he wanted

said material witness to be personally present in Court at the time of trial in order to subject him to direct cross examination before the trier of fact for the best ascertainment of the truth. (R.T.P. 10.) However, when confronted with the possibility that said witness might defeat the extradition proceedings which Petitioners were trying to protect themselves against, the District Attorney argued that it would be a travesty to permit said witness to personally testify because he would be exempt from the service of process. (R.T.P. 14.) As a consequence, the denial of Petitioners' rights to have the process of the Court to compel the attendance of witnesses on their behalf has resulted in a denial of due process of law and a palpable miscarriage of justice. *(California Constitution,* Article VI, Section 4½.)

In this regard, this Court, in the recent case of *Washington v. Texas,* 388 U.S. 14, 18 L. Ed. 2d 1019, 87 S.Ct. 1920, held that an accused's Sixth Amendment right to have compulsory process for obtaining witnesses in his favor was so fundamental that it could be considered incorporated in the due process clause of the Fourteenth Amendment, so as to be applicable in state trials. This Court in *Washington v. Texas,* 18 L. Ed. 2d 1019, at page 1023, cogently stated as follows: "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has

the right to confront the prosecution's witnesses for the purposes of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

This Court then went on to conclude at page 1025 of said case as follows: "We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use. The judgment of conviction must be reversed."

It is fundamental to a fair trial that the defendant be unhampered in the production of witnesses and other evidence in his behalf, and in the presentation of witnesses and evidence at the trial. (See Witkin, *California Criminal Procedure*, Section 349, page 341.) Indeed, the defendant's right to present an affirmative defense is a fundamental procedural and substantial right guaranteed by constitution and by statute. The right to present and cross-examine witnesses is essential to due process of law. (*Jennings v. Superior Court*, 66 Cal. 2d 867, 875.) That counsel for a defendant has a right to reasonable opportunity

to prepare for a trial is as fundamental as is the right to counsel. (*Jennings v. Superior Court,* 66 Cal. 2d 867, 876.)

The wrongful interference with a defendant in preparing for his defense of a criminal prosecution, in the opportunity to interview witnesses who have appeared before a grand jury in the proceedings leading up to the return of the indictment of the defendant, or witnesses whose statements given to the police or district attorney are the basis of a prosecution actually commenced, is a denial of due process and of the equal protection of the laws; and is violative of the right to have compulsory process for obtaining witnesses, which presupposes the right and opportunity to learn if a potential witness can testify to anything of a value to the defense. (See *People v. Mersino,* 237 Cal. App. 2d 265, 269; 46 Cal. Rptr. 821.)

The Court of Appeal in its decision was in error to hold that all parties expected the informer to be extradited to California. Contrary to this holding of the Court of Appeal, there was every reason to expect that the prosecution's efforts to return the informer to the state for prosecution on the reinstated criminal charge would not be successful. This was so, simply because of the fact that the prosecution in recharging and reinstating the original criminal charge was retaliating against the informer for breaching his "deal" with the police in communicating with and giving information favorable to the defense. Under these circumstances, it was highly likely that the Governor

of the State of Wisconsin would not grant extradition, which, in fact, is exactly what did happen. This course of events is exactly what the Petitioners were trying to protect themselves against in asking the trial Court to issue its certificate for issuance of subpoena for out-of-state material witness on condition that extradition be defeated. When it was learned on the eve of the commencement of the trial that the informer could not be extradited, Petitioners did not then ask for a continuance to renew their motion in view of the fact that the trial Court had in the first instance denied the motion on said basis. As such, it cannot be argued that Petitioners waived their right to have the witnesses subpoenaed when Petitioners were laboring under the belief that this could not be done in view of the trial Court's prior ruling.

The decision of the Court of Appeal in holding that the instant case is clearly distinguishable on several grounds from the cases of *Washington v. Texas,* 388 U.S. 14, 18 L. Ed. 2d 1019, 87 S. Ct. 1920; *Pointer v. Texas,* 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923; *People v. Dozier,* 236 Cal. App. 2d 94, 101; and *People v. Bossert,* 14 Cal. App. 111, 111 Pac. 115, is in error.

The decision of the Court of Appeal of the State of California is erroneous in holding that, "First, the testimony of O'Connell in the instant case bore only on the question of the reasonable cause for defendants' arrest and search, and not on the principal question of their innocence or guilt." This is simply not true because O'Connell could have been called upon to testify as to whether or not there had been a sale

or an attempted sale in connection with the charge of possession for sale.

The decision of the Court of Appeal of the State of California is also erroneous in holding that, "Second, the witness sought was not within the jurisdiction of the Court." This begs the question as the witness was within the jurisdiction of the Court pursuant to California Penal Code Section 1334.3. In *People v. Sauceda,* 199 Cal. App. 2d 47 (18 Cal. Rptr. 42), the Court stated at pages 56-57): "Furthermore, when at the time of trial, the defendant learned that the informer was in Missouri, he could have asked for a continuance to make use of the "Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, which has been adopted both in the State of California (Penal Code, Section 1334, et seq.) and the State of Missouri (Vernon's Annotated Missouri Statutes, Laws, 1959, H. B. No. 295, Sec. 491.400, et seq.)." In the instant case, the Petitioners did ask for a continuance to make use of said Act and were denied the same. Therefore, the trial Court prejudicially erred in not granting Petitioners' application and motion for certificate for issuance of subpoena for out-of-state material witness who was essential and material to the trial and defense of this case.

The fact that the informer was in the State of Wisconsin should be of no significance, with present day air travel as it is, as he could have been flown to attend the trial of this matter in a period of approximately four hours. In fact, the case of *People*

v. Bossert, 14 Cal. App. 111, 111 Pac. 115, is on all fours with the instant case. This case recognizes the fact that defendants in criminal cases are entitled to the presence of their witnesses and the benefit of their oral testimony. The testimony of witnesses given in Court is much more effective and far superior to that read in the form of a deposition. The defendant in the *Bossert* case had, as in the case at bar, regularly subpoenaed the witnesses in question. Their testimony was material and important to him. Nevertheless, the trial Court held that he was not entitled to the process of the Court compelling their attendance, and forced the defendant to submit his case to the trier of fact without the benefit of their oral testimony. By this ruling it was clear that the defendant was deprived of a constitutional right, for which the judgment and order were reversed and the cause remanded for a new trial.

The decision of the Court of Appeal of the State of California is also further erroneous in holding that, "Third, and most important, the peculiar facts of this case indicate a waiver of the rights that defendants here claim." Contrary to the holding of the Court of Appeal of the State of California, there was no unexpected unavailability of O'Connell, as the Petitioners had anticipated his expected unavailability by previously making their application and motion for certificate for issuance of subpoena for out-of-state material witness on condition that extradition be defeated. In the case of *People v. Avila,* 253 ACA 354, no application was made to produce the witness under

the applicable statutory section. Where, as in the instant case, however, a timely and proper application was made, the failure to issue such an order, upon proper showing, was prejudicial error. (See *People v. Avila*, 253 ACA 354, 377; *People v. Bossert*, 14 Cal. App. 111, 111 Pac, 115.)

The decision of the Court of Appeal of the State of California is further erroneous in holding that the trial Court, under the circumstances of the instant case, had the discretion under Penal Code Section 1334.3 to deny the Petitioners' motion to issue certificate for issuance of subpoena for a *material* out-of-state witness. This holding is in direct conflict with the case of *People v. Newville*, 220 Cal. App. 2d 267. In the *Newville* case, there was no proper showing that the witnesses sought to be subpoenaed were material witnesses. However, in the instant case, there was not only a proper showing that O'Connell was a material witness, but this was an admitted fact by all parties at all times, and, in fact, the Court of Appeal of the State of California found that, "There can be no question that under the circumstances of this case, O'Connell, as an informer-participant, was a material witness *(People v. Castedy*, 194 Cal. App. 2d 763, at page 768) and the prosecution so conceded at the trial." Therefore, under the circumstances of the instant case, and the rules set down by the case of *People v. Newville*, the trial Court committed prejudicial error and completely abused its discretion in denying the motion to compel the attendance of an out-of-state *material* witness. To have abused its

discretion in this manner is in complete derogation of fundamental constitutional requirements of due process of law.

Finally, the decision of the Court of Appeal of the State of California in considering the fact that "Under Section 1334.4, the state would have had to grant immunity to the witness as to all matters which occurred in the state prior to his return" is erroneous and unfair. It must be remembered that the state had previously, on its own motion, in effect granted O'Connell immunity by dismissing the pending criminal charge against him. The only possible reason for the state in recharging him with a crime previously dismissed was retaliation against him for breaching his "deal" and communicating with and giving information favorable to the defense. To hold otherwise would permit the state to reward the informer-participant-material witness with immunity conditioned on his not personally testifying for the defense in this State which again would be in complete derogation of all fundamental constitutional requirements of due process of law and concepts of fair play.

2. The procedures resorted to in Petitioners' case, which not only encouraged but facilitated the informer to leave the State of California, but repelled him from the State of California, denied Petitioners a fair trial and deprived them of due process of law.

The statement of Sergeant Allbritton, a police officer, to the informant to the effect that he was at liberty to leave the State of California, when coupled

with an accommodating dismissal of serious pending criminal charges against said informant pursuant to a "deal," clearly manifests an intention to render the informant immune from process of the Court to obtain his presence at the trial and thereby avoid the very purpose of the disclosure rule. The denial by the prosecution of an opportunity for the Petitioners to seek out the informer and to defend by those means, where the testimony of the informer would be material to the issues, is unfair and oppressive to the Petitioners and deprives them of due process of law. (See *Roviaro v. United States*, 353 U. S. 53, 63-64 [77 S. Ct. 623, 1 L. Ed. 2d 639]; *People v. McShann*, 50 Cal. 2d 802 [330 P. 2d 33]; *People v. Kiihoa*, 53 Cal. 2d 748, 752 [3 Cal. Rptr. 1, 349 P. 2d 673].) This situation was clearly aggravated and compounded by the prosecution when it recharged the informant with a crime previously dismissed, in retaliation against the informant for breaching his "deal" and communicating with and giving information favorable to the defense. When the prosecution recharged the informant for breaching his "deal" with the police, this course of action clearly repelled the informant from the State of California. As a consequence, the informant's absence from the State was not only encouraged, but was created and caused by the State. Under this set of circumstances, the risk that the informant could not be successfully extradited was great. In the final analysis, this was borne out by the fact that the prosecution was unable to successfully extradite the informant.

The case of *People v. Kiihoa,* 53 Cal. 2d 748 (3 Cal. Rptr. 1, 349 P. 2d 673) is directly analogous to the case at bar. In the *Kiihoa* case, the prosecution first arrested, then released and rearrested the defendant in order to avoid the necessity of identifying the informer at a time when the defendant could have procured the informer's attendance at the trial and have elicited testimony from him. In the instant case, the prosecution first charged, then dismissed and recharged the informer in retaliation for breaching his "deal" with the police by communicating with and giving information favorable to the defense. This course of action effectively repelled the informer from the State of California, and rendered him immune from process, particularly in view of the fact that extradition was defeated, and the trial Court refused to issue a subpoena for an out-of-state material witness even should extradition be defeated. The procedure resorted to in both cases manifestly denied the defendant a fair trial, just as effectively as if the informer had never been identified.

The fact is that the totality of State action in the instant case completely repelled the informer from the State of California and prevented the Petitioners from producing him at the time of trial as a witness in their own defense. As such, the decision of the Court of Appeal of the State of California is in error, even though there may have been no deliberate planning in the instant case. Therefore, the Petitioners were denied a fair and impartial trial under the principles of *People v. Kiihoa,* 53 Cal. 2d 748 (3 Cal.

Rptr. 1, 349 P. 2d 673) and the Sixth and Fourteenth Amendments to the Constitution of the United States of America.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari be granted.

Dated, Vallejo, California,
April 15, 1968.

Respectfully submitted,
LEGGETT, GIANOLA & DACEY,
By CHARLES M. GIANOLA,
Member of the Bar of the Supreme Court of the United States of America,
Counsel for Petitioners.

(Appendices Follow)